

SUBCHAPTER E—RATES AND TERMS FOR STATUTORY LICENSES

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NON-SUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Subpart A—Commercial Webcasters and Noncommercial Webcasters

Sec.

- 380.1 General.
- 380.2 Definitions.
- 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.
- 380.4 Terms for making payment of royalty fees and statements of account.
- 380.5 Confidential Information.
- 380.6 Verification of royalty payments.
- 380.7 Verification of royalty distributions.
- 380.8 Unclaimed funds.

Subpart B—Broadcasters

- 380.10 General.
- 380.11 Definitions.
- 380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.
- 380.13 Terms for making payment of royalty fees and statements of account.
- 380.14 Confidential Information.
- 380.15 Verification of royalty payments.
- 380.16 Verification of royalty distributions.
- 380.17 Unclaimed funds.

Subpart C—Noncommercial Educational Webcasters

- 380.20 General.
- 380.21 Definitions.
- 380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings.
- 380.23 Terms for making payment of royalty fees and statements of account.
- 380.24 Confidential Information.
- 380.25 Verification of royalty payments.
- 380.26 Verification of royalty distributions.
- 380.27 Unclaimed funds.

AUTHORITY: 17 U.S.C. 112(e), 114(f), 804(b)(3).

SOURCE: 76 FR 13046, Mar. 9, 2011, unless otherwise noted.

Subpart A—Commercial Webcasters and Noncommercial Webcasters

§ 380.1 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees as set forth in this subpart in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service

transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

Broadcaster is a type of Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Commercial Webcaster is a Licensee, other than a Noncommercial Webcaster, that makes eligible digital audio transmissions.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114, and subject to the limitations specified in 17 U.S.C. 112(e).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h) of this chapter, or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions, but that is not—

(1) A Broadcaster as defined in § 380.11; or

(2) A Noncommercial Educational Webcaster as defined in § 380.21.

Noncommercial Webcaster is a Licensee that makes eligible digital audio transmissions and

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.*, the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.*, a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Side Channel is a channel on the Web site of a Broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the Broadcaster.

§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) are as follows:

(1) *Commercial Webcasters:* For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Commercial Webcaster will pay a royalty of: \$0.0019 per performance for 2011; \$0.0021 per performance for 2012; \$0.0021 per performance for 2013; \$0.0023 per performance for 2014; and \$0.0023 per performance for 2015.

(2) *Noncommercial Webcasters:* (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of \$500 in 2011, 2012, 2013, 2014, and 2015.

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay a royalty of: \$0.0019 per performance for 2011; \$0.0021 per performance for 2012; \$0.0021 per performance for 2013; \$0.0023 per performance for 2014; and \$0.0023 per performance for 2015.

(b) *Minimum fee*—(1) *Commercial Webcasters.* Each Commercial Webcaster will pay an annual, non-refundable minimum fee of \$500 for each calendar year or part of a calendar year of the period 2011–2015 dur-

ing which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Commercial Webcasters, provided that a Commercial Webcaster shall not be required to pay more than \$50,000 per calendar year in minimum fees in the aggregate (for 100 or more channels or stations). For each such Commercial Webcaster, the annual minimum fee described in this paragraph (b)(1) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(2) *Noncommercial Webcasters.* Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each calendar year or part of a calendar year of the period 2011–2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Noncommercial Webcasters. For each such Noncommercial Webcaster, the annual minimum fee described in this paragraph (b)(2) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(c) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

§ 380.4

37 CFR Ch. III (7–1–11 Edition)

§ 380.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 380.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the FEDERAL REGISTER within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 on a monthly basis on or before the 45th day after the end of each month for that month. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that payment for a Licensee that has not

previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the related statement of account are received by the Collective.

(f) *Statements of account.* Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby

state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in §370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of the section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §380.8.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.5 Confidential Information.

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and

distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee’s statement of account pursuant to §380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same

§ 380.6

degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall

37 CFR Ch. III (7–1–11 Edition)

review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and

records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The

foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart B—Broadcasters

§ 380.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Broadcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours means the total hours of programming that the Broadcaster has transmitted during the relevant period to all listeners within the United States from any channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions.

Broadcaster means an entity that:

(1) Has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to

make Eligible Transmissions and related ephemeral recordings;

(3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcaster Webcasts mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are not Broadcast Retransmissions.

Broadcast Retransmissions mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming that does not require a license under United States copyright law or that is transmitted on an Internet-only side channel.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Small Broadcaster is a Broadcaster that, for any of its channels and stations (determined as provided in § 380.12(c)) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria:

(1) During the prior year it made Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; and

(2) During the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; provided that, one time during the period 2011–2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for

that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding paragraph (1) of the definition of “Small Broadcaster” if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

§ 380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in § 380.13(g)(3), be payable on a per-performance basis, as follows:

- (1) 2011: \$0.0017;
- (2) 2012: \$0.0020;
- (3) 2013: \$0.0022;
- (4) 2014: \$0.0023;
- (5) 2015: \$0.0025.

(b) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting as set forth in § 380.3.

(c) *Minimum fee.* Each Broadcaster will pay an annual, nonrefundable minimum fee of \$500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2011–2015 during which the Broadcaster is a licensee pursuant to licenses under 17

U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than \$50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For the purpose of this subpart, each individual stream (*e.g.*, HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective for the reporting waiver discussed in § 380.13(g)(2).

§ 380.13 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Broadcaster shall make the royalty payments due under § 380.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Broadcasters due under § 380.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) and 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on

§ 380.13

37 CFR Ch. III (7–1–11 Edition)

the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the FEDERAL REGISTER within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments and reporting.* Broadcasters must make monthly payments where required by § 380.12, and provide statements of account and reports of use, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Broadcaster shall make any minimum payment due under § 380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) *Late fees.* A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use is received by the Collective, provided that, in the case of a timely provided

but noncompliant statement of account or report of use, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Broadcasters in General.* (1) Broadcasters other than electing Small Broadcasters covered by paragraph (g)(2) of this section shall submit reports of use on a per-performance basis in compliance with the regulations set forth in part 370 of this chapter, except that the following provisions shall apply notwithstanding the provisions of such part 370 of this chapter from time to time in effect:

(i) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hour basis as provided in paragraph (g)(3) of this section.

(ii) Broadcasters shall submit reports of use to the Collective on a monthly basis.

(iii) As provided in paragraph (d) of this section, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(iv) Except as provided in paragraph (g)(3) of this section, Broadcasters shall submit reports of use to the Collective on a census reporting basis (*i.e.*, reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(v) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis;

(vi) Broadcasters shall transmit each report of use in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the report covers a single station only, the call letters of the station.

(vii) Broadcasters shall submit reports of use with headers, as presently described in §370.4(e)(7) of this chapter.

(viii) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the statement covers a single station only, the call letters of the station.

(2) On a transitional basis for a limited time in light of the unique business and operational circumstances currently existing with respect to Small Broadcasters and with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations.

Small Broadcasters that have made an election pursuant to paragraph (h) of this section for the relevant year shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related Ephemeral Recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 Aggregate Tuning Hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to the Collective a \$100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(3) Broadcasters generally reporting pursuant to paragraph (g)(1) of this section may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hours basis, if

(i) Census reporting is not reasonably practical for the programming during those hours, and

(ii) If the total number of hours on a single report of use, provided pursuant to paragraph (g)(1) of this section, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

(A) 2011: 16%;

(B) 2012: 14%;

(C) 2013: 12%;

(D) 2014: 10%;

(E) 2015: 8%.

(iii) To the extent that a Broadcaster chooses to report and pay for usage on an Aggregate Tuning Hours basis pursuant to this paragraph (g)(3), the Broadcaster shall

(A) Report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour;

(B) Pay royalties (or recoup minimum fees) at the per-performance rates provided in §380.12 on the basis of paragraph (g)(3)(iii)(A) of this section;

(C) Include Aggregate Tuning Hours in reports of use; and

(D) Include in reports of use complete playlist information for usage reported on the basis of Aggregate Tuning Hours.

(h) *Election of Small Broadcaster Status.* To be eligible for the reporting waiver for Small Broadcasters with respect to any particular channel in a given year, a Broadcaster must satisfy the definition set forth in § 380.11 and must submit to the Collective a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than January 31 of the applicable year. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

(i) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Broadcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in § 370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Broadcaster, such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(j) *Retention of records.* Books and records of a Broadcaster and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.14 Confidential Information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Broadcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Broadcaster's statement of account pursuant to § 380.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Broadcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners

and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.15 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Broadcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Broadcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Broadcaster, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Broadcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Broadcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books

and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Broadcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon

reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart C—Noncommercial Educational Webcasters

§ 380.20 General.

(a) *Scope.* This subpart establishes rates and terms, including requirements for royalty payments, record-keeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Noncommercial Educational Webcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmissions within the scope of such agreements.

§ 380.21 Definitions.

For purposes of this subpart, the following definitions shall apply:

ATH or Aggregate Tuning Hours means the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission means an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Noncommercial Educational Webcaster means Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution; and

(4) Is not a “public broadcasting entity” (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Noncommercial Educational Webcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings, including, but

§ 380.22

37 CFR Ch. III (7–1–11 Edition)

not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

§ 380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Minimum fee.* Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of \$500 (the “Minimum Fee”) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (*e.g.*, HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.23(g)(1), shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective.

(b) *Additional usage fees.* If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (“Usage Fees”) for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

- (1) 2011: \$0.0017;
- (2) 2012: \$0.0020;
- (3) 2013: \$0.0022;
- (4) 2014: \$0.0023;
- (5) 2015: \$0.0025.

(6) For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay its Usage Fees at the per-performance rates provided in paragraphs (b)(1) through (5) of this section based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per-channel or -station basis.

(c) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered by this subpart is deemed to be included within the royalty payments set forth in paragraphs (a) and (b)(1) through (5) of this section and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting in § 380.3.

§ 380.23 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Noncommercial Educational Webcaster shall make the royalty payments due under § 380.22 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Noncommercial Educational Webcasters due under § 380.22 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents,

entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc., should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the FEDERAL REGISTER within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Minimum fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. Payments of minimum fees must be accompanied by a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by the Collective, that the Noncommercial Educational Webcaster.

(1) Qualifies as a Noncommercial Educational Webcaster for the relevant year; and

(2) Did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in paragraph (g) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(d) *Usage fees.* In addition to its obligations pursuant to paragraph (c) of this section, a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.22(b), and provide statements of account to accompany these payments, for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(e) *Late fees.* A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with the applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly for the balance due, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use (as applicable) is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.22 shall be accompanied by a corresponding statement of

account. A statement of account shall contain the following information:

- (1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and if the statement of account covers a single station only, the call letters or name of the station;
- (2) Such information as is necessary to calculate the accompanying royalty payment as prescribed in this subpart;
- (3) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (4) The handwritten signature of an officer or another duly authorized faculty member or administrator of the applicable educational institution;
- (5) The printed or typewritten name of the person signing the statement of account;
- (6) The date of signature;
- (7) The title or official position held by the person signing the statement of account;
- (8) A certification of the capacity of the person signing; and
- (9) A statement to the following effect:

I, the undersigned officer or other duly authorized faculty member or administrator of the applicable educational institution, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Noncommercial Educational Webcasters in general—*

(1) *Reporting waiver.* In light of the unique business and operational circumstances currently existing with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a non-refundable, annual Proxy Fee of \$100 in

lieu of providing reports of use for the calendar year pursuant to the regulations at §370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this paragraph (g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

(2) *Sample-basis reports.* A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at §370.4 of this chapter, except that, notwithstanding §370.4(d)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station

name and play frequency. Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) *Census-basis reports.* If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to this paragraph (g)(3):

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (g)(1) or (2) of this section. A Noncommercial Educational Webcaster required to report pursuant to this paragraph (g)(3) shall provide reports of use to the Collective quarterly on a census reporting basis (*i.e.*, reports of use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by §370.4 of this chapter), except that, notwithstanding §370.4(d)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with this paragraph (g)(3). For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this paragraph (g)(3) for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under this paragraph (g)(3) shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(h) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Noncommercial Educational Webcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Educational Webcaster equally based upon the information provided under the report of use requirements for Noncommercial Educational Webcasters contained in §370.4 of this chapter and this subpart, except that in the case of Noncommercial Educational Webcasters that elect to pay a Proxy Fee in lieu of providing reports of use pursuant to paragraph (g)(1) of this section, the Collective shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 3 years from the date of payment by a Noncommercial Educational Webcaster, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) *Server logs.* Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting under this subpart. To the extent that a third-party Web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be

§ 380.24

37 CFR Ch. III (7–1–11 Edition)

created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

§ 380.24 Confidential Information.

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of Usage Fees paid, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Educational Webcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to Confidential Information;

(2) An independent Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Educational Webcaster’s statement of account pursuant to § 380.25 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.26;

(3) Copyright Owners and Performers, including their designated agents,

whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Noncommercial Educational Webcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.25 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Noncommercial Educational Webcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Noncommercial Educational Webcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Noncommercial Educational Webcaster, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice

announcing such filing. The notification of intent to audit shall be served at the same time on the Noncommercial Educational Webcaster to be audited. Any such audit shall be conducted by an independent Qualified Auditor identified in the notice and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Noncommercial Educational Webcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Noncommercial Educational Webcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Noncommercial Educational Webcaster reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Noncommercial Educational Webcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.26 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the FEDERAL REGISTER a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud

§ 380.27

and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.27 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

PART 381—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

Sec.

381.1 General.

381.2 Definition of public broadcasting entity.

381.3 [Reserved]

381.4 Performance of musical compositions by PBS, NPR, and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(c).

381.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.

37 CFR Ch. III (7–1–11 Edition)

381.6 Performance of musical compositions by other public broadcasting entities.

381.7 Recording rights, rates and terms.

381.8 Terms and rates of royalty payments for the use of published pictorial, graphic, and sculptural works.

381.9 Unknown copyright owners.

381.10 Cost of living adjustment.

381.11 Notice of restrictions on use of reproductions of transmission programs.

AUTHORITY: 17 U.S.C. 118, 801(b)(1) and 803.

SOURCE: 72 FR 67647, Nov. 30, 2007, unless otherwise noted.

§ 381.1 General.

This part establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning on January 1, 2008, and ending on December 31, 2012. Upon compliance with 17 U.S.C. 118, and the terms and rates of this part, a public broadcasting entity may engage in the activities with respect to such works set forth in 17 U.S.C. 118(c).

§ 381.2 Definition of public broadcasting entity.

As used in this part, the term *public broadcasting entity* means a non-commercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. 118(c).

§ 381.3 [Reserved]

§ 381.4 Performance of musical compositions by PBS, NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(c).

The following schedule of rates and terms shall apply to the performance by PBS, NPR and other public broadcasting entities engaged in activities set forth in 17 U.S.C. 118(c) of copyrighted published nondramatic musical compositions, except for public broadcasting entities covered by §§ 381.5 and 381.6, and except for compositions which are the subject of voluntary license agreements.

(a) *Determination of royalty rate.* (1) For performance of such work in a feature presentation of PBS: